90-936

No._____

FILED
DEC 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

PETER BARDUNIAS, BONNIE BARDUNIAS, PETER BARDUNIAS as parent and natural guardian of PAUL BARDUNIAS and JOHN BARDUNIAS and PETER BARDUNIAS,

Petitioners,

against

COUNTY OF WESTCHESTER, CARL A. VERGARI, as District Attorney and JON N. WILLCOX, individually and as Assistant District Attorney,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

JANET CUNARD
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ISSUES PRESENTED

Is a prosecutor entitled to absolute or qualified immunity when he is performing the function of a police officer?

If, when performing an investigation, the prosecutor performs part of the investigation before a grand jury, does that change the degree of immunity to which the prosecutor is entitled?

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CITATION TO CASE

Bardunias v. County of Westchester, 158 AD 2d 679, 552 NYS 2d 134 (1990), lv. den. _ NY 2d__, mot. rearg. den. __NY 2d__

JURISDICTION

The Appellate Division affirmed by order dated February 26, 1990.

The Court of Appeals denied leave to appeal by order dated June 12, 1990 and denied a motion to reargue by order dated September 13, 1990.

CONSTITUTIONAL PROVISIONS

Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FACTS

Peter Bardunias, a collection attorney, entered into two contracts with the County of Westchester to collect monies due to the County. Under one contract all payments and reports were properly and timely made and under the other, payment of approximately $20,000 was late in being turned over. At all times the money, including the earned commission, was held in an escrow account.

After all monies had been turned over to the County, Respondent Willcox undertook a "confidential investigation" into Mr. Bardunias' law firm. The entire investigation was conducted by assistant district attorneys and other members of the staff without any assistance from any other source.

On October 8, 1982, a search warrant was executed at Mr. Bardunias' office by

members of the district attorney's staff under the direction of Willcox, and subpoenas served. From that time until May, 1984, an "extensive investigation" was conducted by Willcox and other members of the district attorney's staff, both "on the street" and in the grand jury.

A non-jury trial commenced on May 30, 1985 and the charges against Bonnie Bardunias were dismissed at the close of the opening statement. The charges against Peter Bardunias were dismissed on June 26, 1985, at the close of the prosecutor's case.

The sole issue that has been considered and determined in this action is whether the district attorney and his assistant are entitled to absolute or qualified immunity for their actions.

The State courts found that the district attorney and his staff received only qualified immunity for their part in

the execution of the search warrant but received absolute immunity for all other actions.

REASONS FOR GRANTING WRIT

"Immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches" Forrester v. White, 484 US 219 (1988); see also: Sheuer v. Rhodes, 416 US 232 (1974); Arteaga v. State of New York, 72 NY 2d 212 (1988). No immunity is absolute by virtue of a title. Even "judicial immunity" is not absolute when a judge is acting in an administrative capacity rather than his traditional judicial capacity (Forrester v. White, supra).

Police officers and complaining witnesses (Malley v. Briggs, 475 US 335 [1986]; Pierson v. Ray, 386 US 547 [1967]) are not entitled to absolute immunity and

the public prosecutor when performing those functions should not be entitled to absolute immunity.

The Court of Appeals of the State of New York, in considering an application for a writ of prohibition, has held that an investigation before a grand jury is analogous to a police investigation and not a quasi-judicial activity

> "The role of a public prosecutor in our system of criminal justice has two fundamentally distinct and separate aspects", (1) "representing the State in its efforts to bring individuals accused of crime to justice" and in that function he is "performing a 'quasi-judicial' act", and (2) "perform(ing) a role 'analogous to that of a police officer', which entails the investigation of suspicious circumstances with a view toward determining whether a crime has been committed", and "when this purely investigative function is involved, the acts of the public prosecutor are to be regarded as 'executive' in nature". "That the matter had been brought to the attention of a Grand Jury does not detract from our conclusion that no 'quasi-judicial' activity was involved, since Grand Juries no less than public prosecutors have investigative as

> well as accusatory functions to perform in our system of criminal justice". McGinley v. Hynes, 51 NY2d 116 (1980)

That some of the investigation was conducted by the district attorney before a grand jury does not change the fact that it was an investigation, a police function. It was the district attorney who undertook to investigate an anonymous complaint and then prosecute the defendant. He was the complainant.

> "Where...the constitutional tort is the action of a police officer in initiating a baseless prosecution, his role as a 'complaining witness' renders him liable to the victim under 1983 just as it did at common law, and the fact that his testimony at a judicial proceeding may have been the means by which he initiated the prosecution does not permit him to transpose the immunity available for defamation as a defense to malicious prosecution". White v. Frank and Marshall, 855 F2d 956 (2Cir 1988).

Thus, it is clear that an attempt to cloak the district attorney's investigative function in the grand jury

with absolute immunity violates due process of law because it creates a situation in which a defendant may in fact be prosecuted maliciously without there being any liability on any person for the wrongful act. Were a state permitted such a rule of law it would constitute a license to the public prosecutor to wantonly and maliciously harm his personal enemies (as was the case here) without any deterring liability. While the decided cases are mainly federal civil rights actions the principle must apply equally to state actions for malicious prosecution under the Fourteenth Amendment.

CONCLUSION

WHEREFORE, it is respectfully submitted that a Writ of Certiorari should issue to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department in the instant matter.

Dated: White Plains, NY
December 6, 1990

Respectfully submitted,

Janet E. Cunard

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APPELLATE DIVISION ORDER

158 AD2d 679

MILTON MOLLEN, P.J.
GUY J. MANGANO — DECISION AND ORDER
JOSEPH J. KUNZEMAN
SYBIL HART KOOPER, JJ.

2119E
Rosen & Bardunias, et al., appellants-respondents. v County of Westchester, et al., respondents-appellants.
(Action No. 1)
Peter Bardunias, et al., appellants-respondents, v. County of Westchester, et al., respondents-appellants.
(Action No. 2)

Morosco and Cunard, White Plains, N.Y. (Janet Cunard of counsel), for appellants-respondents.
Rende, Ryan & Downes, White Plains, N.Y. (Wayne M. Rubin of counsel), for respondents-appellants County of Westchester and Carl A. Vergari.
Meade, Dore & Voute, White Plains, N.Y. (Stephen F. Fischer of counsel; Marcia O. Andicoli on the brief), for respondent-appellant John N. Willcox.

In two consolidated actions, inter alia, to recover damages for malicious prosecution, unlawful imprisonment and civil rights violations, the plaintiffs appeal, as limited by their brief, from

so much of an order of the Supreme Court, Westchester County (Delaney, J.), entered April 28, 1988, as granted the defendants' motions for summary judgment to the extent of dismissing the plaintiffs first seven causes of action in Action Number 2 and struck all demands for punitive damages in both actions, and the defendants separately cross-appeal, as limited by their briefs, from so much of the same order as denied in part, those branches of their motions which were for summary judgment dismissing the complaint in Action Number 1.

ORDERED that the order is modified, on the law, by deleting the provisions thereof which denied so much of those branches of the defendants' motions which were for summary judgment dismissing the plaintiffs' causes of action to recover damages for assault, unlawful imprisonment and conversion, and

substituting therefor provisions granting so much of those branches of the defendants' motions which were for summary judgment dismissing the plaintiffs' causes of action to recover damages for assault, unlawful imprisonment and conversion, and by deleting the provision thereof which struck the plaintiffs' demand for punitive damages against the defendant Willcox in Action Number 1, and substituting therefor a provision denying that branch of the defendant Willcox's motion which was to strike the demand for punitive damages against him in Action Number 1; as so modified the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

Contrary to the plaintiffs' contentions, the Supreme Court correctly dismissed the first seven causes of

action in Action Number 2. Notwithstanding the plaintiffs' allegations that the Assistant District Attorney Willcox was motivated by malice and was less than forthright in his prosecution of the criminal charges for which the plaintiffs were ultimately exonerated, the defendants are absolutely immune from civil liability for exercising this prosecutorial function (see, Imbler v Pachtman, 424 US 409; Arteaga v State of New York, 72 NY2d 212, 216; Ryan v State of New York, 81 AD 2d 947, affd 56 NY 2d 561; Whitmore v City of New York, 80 AD 2d 638). Furthermore, the Supreme Court correctly denied the defendants summary judgment on the plaintiffs' causes of action in Action Number 1 arising out of the manner in which the defendants obtained and executed the search warrant in the course of the criminal investigation of the

plaintiffs. With regard to these claims, the defendants were acting only in an investigatorial capacity, and thus were correctly held to enjoy only a qualified immunity from civil liability (see, Bacon v County of Westchester, 149 AD2d 451; Cunningham v State of New York, 71 AD2d 181; Drake v City of Rochester, 96 Misc 2d 86 affd 74 AD2d 996).

Although the defendants were not entitled to summary judgment in Action Number 1 on the ground of absolute prosecutorial immunity, several of the plaintiffs' causes of action in Action Number 1 should have been dismissed owing to the inadequacy of the plaintiffs' notices of claim (see, General Municipal Law 50-e). Since the notice of claim relating to Action Number 1 fails to adequately apprise the county and the individual defendants of the plaintiffs' assault, unlawful imprisonment or

conversion causes of action, these causes of action should have been dismissed (see, Mojica v New York City Tr. Auth. 117 AD2d 722).

We further conclude that the court erred in granting that branch of the motion of the defendant Willcox which was to strike the demand for punitive damages against him. Although punitive damages are not available against a municipal corporation because the imposition of such damages would punish the taxpayer rather than the wrongdoer (see, Sharapata v Town of Islip, 56 NY2d 332; Bishop v Bostick, 141 AD2d 487), punitive damages may be assessed against a municipal employee who engages in intentional wrongdoing in excess of the scope of his official duties. Under such circumstances, the employeee will not be entitled to indemnification (Public Officers Law 18[4][b], [c]), but, rather,

will be personally liable for any punitive damages assessed against him (Carney v City of Utica, 148 AD2d 927; Kelly v Kane, 98 AD2d 861; Miller v City of Rensselaer, 94 AD2d 862). In the case at bar, the plaintiffs have alleged that the defendant Willcox committed intentional and malicious acts during the investigatory phase of the plaintiffs' prosecution which are clearly beyond the scope of his authority as an Assistant District Attorney. Accordingly, the plaintiffs are entitled to seek punitive damages against this defendant only.

We have reviewed the parties' remaining contentions and find them to be without merit.

MOLLEN, P.J., MANGANO, KUNZEMAN, and KOOPER, JJ., concur.

ENTER:

Martin H. Brownstein

February 26, 1990 Clerk

SUPREME COURT ORDER

INDEX #18404/83
MOTION DATE 12/9/87

SUPREME COURT: WESTCHESTER COUNTY

ROSEN & BARDUNIAS, PETER BARDUNIAS, BONNIE BARDUNIAS and FLORENCE MAURO,

Plaintiffs,

-against-

COUNTY OF WESTCHESTER, CARL A. VERGARI, as District Attorney, and JON N. WILLCOX, Individually and as Assistant District Attorney,

Defendants

INDEX #9830/86

PETER BARDUNIAS, BONNIE BARDUNIAS, PETER BARDUNIAS as parent and natural guardian of PAUL BARDUNIAS and JOHN BARDUNIAS and PETER BARDUNIAS

Plaintiffs,

-against-

COUNTY OF WESTCHESTER, CARL A. VERGARI, as District Attorney and JON N. WILLCOX, Individually and as Assistant District Attorney

Defendants

DELANEY, J.

Defendants, County of Westchester and Carl Vergari, as District Attorney,

have moved for an Order pursuant to CPLR 3212 granting movants summary judgment dismissing and severing Action No. 1 as to them, and pursuant to CPLR 3212(c) granting movants partial summary judgment dismissing the first seven causes of action in Action No. 2, on the grounds that the causes of action sought to be dismissed in the two actions are barred by the absolute immunity of the movants, fail to state a cause of action, are without merit, and/or are precluded by plaintiffs' failure to comply with General Municipal Law 50-e.

Defendant, Jon N. Willcox, has cross-moved for an Order pursuant to CPLR 3212 granting said defendant summary judgment dismissing both causes of action on the grounds that both actions are barred by the absolute immunity of the defendant, fail to state a cause of action, and are precluded by plaintiffs'

failure to comply with General Municipal Law 50-e.

FACTS

On or about November 1, 1978, the law firm of Rosen and Bardunias entered into a contract with the County of Westchester to do collection work on some of the delinquent accounts of persons who were patients at the Westchester County Medical Center. According to the affidavit of Assistant District Attorney Jon N. Willcox submitted in support of a search warrant (Exhibit B), in or about August, 1982, the District Attorney's Office was contacted by an employee from the office of Rosen and Bardunias who indicated that Peter Bardunias had been embezzling funds collected on behalf of Westchester County Medical Center. This employee also asserted that Peter

Bardunias was altering his business records to conceal the theft.

The above mentioned affidavit of A.D.A. Willcox also indicates that on or about August 10, 1982, he commenced a criminal investigation into the handling of collection proceeds from Westchester County Medical Center debtors by Rosen and Bardunias and that the investigation developed evidence tending to show Grand Larceny and Falsification of Business Records in the First Degree. Based on the Willcox affidavit, on October 8, 1982, Westchester County Court Judge James R. Cowhey issued a warrant to the District Attorney's Office to search the offices of Rosen and Bardunias. The legality and propriety of that search is the subject of Action No. 1. Plaintiffs in Action No. 1 are Peter Bardunias, Bonnie Bardunias, Florence Mauro and the law firm of Rosen and Bardunias.

SUPREME COURT ORDER

Extensive Grand Jury proceedings followed after the execution of the search warrant, which resulted in an indictment of Peter and Bonnie Bardunias on May 31, 1984. The criminal trial of Peter and Bonnie Bardunias began on May 31, 1984. The criminal trial of Peter and Bonnie Bardunias began on May 30, 1985. The charges against Bonnie Bardunias were dismissed on May 30, 1985. The charges against Peter Bardunias were dismissed on June 26, 1985, at the close of the prosecutor's case. In Action No. 2 brought by Bonnie and Peter Bardunias individually and as parents of Peter, Paul and John Bardunias, plaintiffs allege wrongful conduct by the District Attorney of Westchester County in investigating, instituting and prosecuting criminal charges against the claimants.

CAUSES OF ACTION RELATED TO THE PROSECUTION

Defendants' motions for summary judgment are based primarily upon their assertion that the plaintiffs' causes of action are barred by the absolute immunity of the movants. Questions involving the extent of prosecutorial immunity in a case such as this can be more easily addressed by first examining its application to plaintiff's malicious prosecution causes of action in Action No. 2.

In order to establish a malicious prosecution action arising out of a criminal proceeding, the plaintiff must prove that (1) the defendant either commenced or continued a criminal proceeding against the plaintiff, (2) the proceeding terminated in the plaintiff's favor, (3) there was no probable cause

for the criminal proceeding, and (4) the criminal proceeding was instituted with actual malice. MARTIN V. CITY OF ALBANY, 42 NY 2d 13, 16; BROUGHTON V. STATE OF NEW YORK, 37 NY 2d 451, 457, cert den sub nom. SCHANBARGER V. KELLY, 423 US 929.

In this case, the first two requirements have been conclusively established. As for the third requirement, the Grand Jury indictment creates a presumption of probable cause which can be rebutted only by showing that the indictment was procured by fraud, perjury or other police misconduct. COLON V. CITY OF NEW YORK, 60 NY 2d 78, 83-84, rearg. denied 61 NY 2d 670; MALTI V. STATE OF NEW YORK, 125 AD 2d 958, 960. In order to rebut the presumption of probable cause created by the Grand Jury indictment in this case, plaintiffs have not alleged any type of police misconduct but rather, have

alleged falsification of evidence and bad faith on the part of the District Attorney in preparing and presenting evidence to the Grand Jury. Of course, even if the Court believed that plaintiffs had overcome the presumption of probable cause created by the Grand Jury indictment and plaintiffs had established all the elements of a prima facia case for malicious prosecution, the causes of action based upon the malicious prosecution charge could be dismissed upon a finding of absolute prosecutorial immunity.

It is well established that a District Attorney and his Assistant District Attorneys are entitled to absolute immunity for quasi-judicial actions taken within the scope of the official duties, such as initiating and pursuing a criminal prosecution and presenting the State's case. BRENNER V.

COUNTY OF ROCKLAND, 67 AD 2d 901 motion for leave to appeal denied 47 NY 2d 705; IMBLER V. PACHTMAN, 424 US 409, 430-431. The Supreme Court has stated that qualifying a prosecutor's immunity while he or she was performing a quasi-judicial function "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system", IMBLER V. PACHTMAN, 424 US at 427-28.

Plaintiffs' malicious prosecution causes of action are primarily grounded upon alleged improprieties on the part of A.D.A. Willcox in his presentation of the State's case to the Grand Jury. Plaintiffs' complaint in Action No. 2 contain allegations that A.DA. Willcox knowingly and maliciously presented false testimony to the Grand Jury, withheld evidence which would have allegedly

exonerated Peter and Bonnie Bardunias and continued the Grand Jury investigation though he allegedly knew that Peter and Bonnie Bardunias had committed no crime. While these are certainly very serious allegations, the Court finds that any of plaintiffs' causes of action in Action No. 2 which are based on these allegations, should be dismissed since the alleged misconduct occurred while the prosecutor was performing his quasi-judicial function of presenting the State's case and, therefore, absolute immunity attaches to the case and, therefore, absolute immunity attaches to the prosecutor's actions. See BRENNER V. CITY OF ROCKLAND, 67 AD 2d at 901. RYAN V. STATE OF NEW YORK, 81 AD 2d 917; JOHNSON V. TOWN OF COLONIE, 102 AD 2d 925, 926; CUNNINGHAM V. STATE, 71 AD 2d 181, 183; SCHANBARGER V. KELLY, 35 AD 2d 902, appeal dismissed 29 NY 2d 649, cert.

den. 405 US 919.

Plaintiffs, Peter and Bonnie Bardunias' First, Second and Third causes of action in Action No. 2 which state claims for malicious prosecution and emotional distress inflicted upon them as a result of the prosection are hereby dismissed as to all the defendants due to their absolute immunity from suit. Plaintiffs, Peter and Bonnie Bardunias' Seventh cause of action in Action No. 2, which is a claim for attorneys fees associated with defending their prosecution, is also dismissed due to the absolute immunity of the defendants. The claims of the infant plaintiffs, Peter, Paul and John, for alleged physical damage and severe emotional and psychic damage (Fourth, Fifth and Sixth causes of action) are hereby dismissed due to the absolute immunity of the plaintiffs as well as their failure to state a cause of

action. There is no allegation that the infant plaintiffs were prosecuted by defendants, nor have they established a valid bystander claim since they were never said to be placed in any "zone of danger" as a result of their parents' prosecution.

Having dismissed plaintiffs' first seven causes of action in Action No. 2, plaintiff, Peter Bardunias, as sole proprietor of the law firm of Rosen and Bardunias, is left with a claim for services rendered which has not been disputed by defendant, County of Westchester. It is hereby ordered that judgment is granted against County of Westchester in the amount of $8,200.00 in favor of Peter Bardunias as requested by plaintiff, Peter Bardunias in his Eighth cause of action in Action No. 2.

CAUSES OF ACTION INVOLVING

THE ISSUANCE AND

EXECUTION OF THE SEARCH WARRANT

In Action No. 1, plaintiffs seek relief for the alleged "improper and malicious acts relating to the issuance and execution of (the) search warrant" by defendants. Defendants have claimed that absolute prosecutorial immunity shields the actions of the defendants in obtaining the warrant and initiating the search. Defendants also claim that plaintiffs' causes of action based on the manner in which the search was allegedly conducted must be dismisseed due to the alleged failure of plaintiffs to comply with General Municpal Law 50-e.

From the record before the Court, it appears that defendants were privileged to enter the offices of Rosen and Bardunias to conduct a "proper"

search and seizure since they were issued a search warrant by Judge Cowhey. Though defendants have claimed that their actions in securing the warrant in question are entitled to absolute immunity, the Court believes that the District Attorney's Office was acting in an investigatory capacity in securing the search warrant and, therefore, are entitled to only a qualified immunity. See DRAKE V. CITY OF ROCHESTER, 96 Misc. 2d 86, 100, aff'd. 74 AD 2d 996. While the Court believes that defendants are cloaked with only a qualified immunity in securing the warrant, the Court believes that plaintiffs have failed to state a cause of action based on defendants' alleged malicious intent in securing the warrant. Plaintiffs' attempt to claim prima facie tort liability based on defendants alleged malicious intent in securing the search warrant is dismissed

due to plaintiffs' failure to allege special damages with sufficient particularity. Seee CURIANO V. SUOZZI, 63 NY 2d 113.

Turning now to plaintiffs' causes of action related to the manner in which the search warrant was executed, the Court does not agree with defendants' claim that such causes of action should be dismissed due to the alleged failure of plaintiffs to comply with General Municipal Law 50-e. The Notice of Claim in question alleged that the nature of the claim resulted from "improper and malicious acts relating to the issuance and execution of a search warrant on October 8, 1982". The Notice of Claim also states when, where and how the claim arose, as well as listing items of damages or injuries claimed. Plaintiffs' Complaint contains causes of action sounding in intentional tort (First,

Third, Sixth and Ninth causes of action alleging false imprisonment, conversion, assault and interference with the lawful conduct of a business), violation of civil rights (Second, Fourth, Seventh and Tenth causes of action) and mental distress (Fifth, Eighth and Eleventh causes of action).

The Court believes that the Notice of Claim was sufficient to enable the County of Westchester to investigate the claim. See O'BRIEN V. CITY OF SYRACUSE, 54 NY 2d 353, 358. While the Notice of Claim was sufficient to enable the County of Westchester to investigate the claim, the violation of civil rights claims made in the Second, Fourth, Seventh and Tenth causes of action must be dismissed as to defendant, County of Westchester, due to plaintiffs' failure to allege affirmative culpability on the part of the County of Westchester. See LA BELLE V. COUNTY OF

ST. LAWRENCE, 85 AD 2d 759. Defendants, Carl Vergari as District Attorney and Jon N. Willcox, individually and as Assistant District Attorney, remain as defendants to the alleged civil rights violation cause of action.

PUNITIVE DAMAGES ISSUE

In both Action No. 1 and Action No. 2, plaintiffs seek punitive damages as against all of the named defendants. It is well established that punitive damages may not be assessed against the State or any of its political subdivisions and therefore, plaintiffs are precluded from seeking punitive damages from the County of Westchester. SHARAPATA V. TOWN OF ISLIP, 56 NY 2d 332. Plaintiffs may not recover punitive damages as against Carl Vergari, as District Attorney, due to their failure to claim that he was acting

outside the scope of his employment. See LA BELLE V. COUNTY OF ST. LAWRENCE, 85 AD 2d 759, 761. Plaintiffs also cannot recover punitive damages as against Jon N. Willcox, individually, or as Assistant District Attorney since the claim of malicious intent alone will not suffice to recover exemplary damages where plaintiffs have failed to claim that he was acting outside the scope of his employment. Id.

CONCLUSION

In summary, the Court concludes that plaintiffs' causes of action in Action No. 1 should not be dismissed, except that the causes of action based on alleged civil rights violations by defendants (Second, Fourth, Seventh and Tenth causes of action) should be dismissed solely as against defendant, County of Westchester, not the other

defendants named in the Complaint. Furthermore, plaintiffs' attempt in Action No. 1 to claim prima facie tort liability based on defendants' alleged malicious intent in securing the search warrant fails to state a cause of action due to plaintiffs' failure to allege special damages with sufficient particularity.

As for Action No. 2, the Court orders partial summary judgment dismissing the first seven causes of action in Action No. 2. Causes of action One, Two, Three and Seven are dismissed due to the absolute immunity of defendants. The Fourth, Fifth and Sixth causes of action are dismissed due to absolute prosecutorial immunity of defendants and plaintiffs failure to state a cause of action. The Eighth cause of action in Action No. 2 is an

undisputed claim for services rendered by plaintiff, Peter Bardunias, and the Court orders that judgment be entered against the County of Westchester in the amount $8,200.00 in favor of Peter Bardunias as requested by him in the Eighth cause of Action No. 2. Enter judgment accordingly.

DATED: April 21, 1988

GERARD E. DELANEY, J.S.C.

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STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of June A.D. 1990

Present, Hon. Sol Wachtler,
Chief Judge, presiding.

2-14 Mo. No. 452

Rosen & Bardunias, et al.,
Appellants

v.

County of Westchester, et al.,
Respondents

(Action No. 1)

Peter Bardunias, et al.,
Appellants,

v.

County of Westchester, et al.,
Respondents.

(Action No. 2)

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Donald M. Sheraw
Clerk of the Court

COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of September A.D. 1990

Present, Hon. Sol Wachtler,
Chief Judge, presiding.

Mo. No. 798

Peter Bardunias, et. al.,
Appellants

v.

County of Westchester, et al.,
Respondents.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliveration thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Donald M. Sheraw
Clerk of the Court

VERIFIED COMPLAINT
Index No. 9830/86

SUPREME COURT: WESTCHESTER COUNTY

PETER BARDUNIAS, BONNIE BARDUNIAS, PETER BARDUNIAS as parent and natural guardian of PAUL BARDUNIAS and JOHN BARDUNIAS and PETER BARDUNIAS,

Plaintiffs,

-against-

COUNTY OF WESTCHESTER, CARL A. VERGARI, as District Attorney, and JON N. WILLCOX, Individually and as Assistant District Attorney,

Defendants.

The plaintiffs, as and for their verified complaint, by their attorneys, Morosco and Cunard, allege:

1) At all times herein mentioned plaintiffs were residents of Putnam County, New York.

2) At all times herein mentioned Peter Bardunias was an attorney and the sole proprietor of the law firm known as Rosen and Bardunias.

3) At all times herein mentioned, Bonnie Bardunias was the wife

of Peter Bardunias and a registered nurse who occasionally assisted in the office of Rosen and Bardunias.

4) At all times herein mentioned Peter and Bonnie Bardunias were the parents of Peter, Paul and John.

5) At all times herein mentioned the County of Westchester was a municipal corporation existing under the laws of the State of New York.

6) At all times herein mentioned the defendant Vergari was an attorney duly admitted to practice in New York, was District Attorney of Westchester County and a resident of Westchester County, New York.

7) At all times herein mentioned the defendant Willcox, was an attorney duly admitted to practice in Nw York, was an Assistant District Attorney of Westchester County acting on behalf of the District Attorney and a resident of

Westchester County, New York.

8) At all times herein mentioned all employees and members of the staff of the District Attorney of Westchester County were under the general supervision of defendant Vergari.

9) At all times herein mentioned defendants Vergari and Willcox were agents, servants and employees of the County of Westchester and acting for it and within the scope of their employment by it.

10) On August 27, 1985, a notice of claim was served on the County of Westchester by the plaintiffs and payment or adjustment of the claim has not been made.

11) On August 10, 1982, defendants Willcox and Vergari commenced an investigation against Peter Bardunias, and at no time was any investigation of Peter Bardunias and Rosen and Bardunias

conducted by anyone other than the employees and staff of the defendant Vergari.

12) On October 8, 1982, defendant Willcox secured a search warrant and together with other members of the staff of the defendant Vergari executed it at the office of Rosen and Bardunias.

13) On October 8, 1982, defendant Willcox and members of the staff of the defendant Vergari seized books, records, papers and other materials from the office of Rosen and Bardunias.

14) On or about October 19, 1982, the defendant Willcox and other attorneys on the staff of the defendant Vergari commenced presenting evidence to a grand jury.

15) The defendant Willcox and other attorneys on the staff of the defendant Vergari presented evidence to the grand jury which they knew or should

have known was false and grossly misleading.

16) The defendant Willcox and other attorneys on the staff of the defendant Vergari failed to present evidence to the grand jury which they knew or should have known would show the falsity and grossly misleading nature of the evidence presented.

17) In May, 1984, a grand jury of Westchester County returned an indictment against Peter and Bonnie Bardunias, charging them with various felonious acts.

18) The defendants Willcox and Vergari and other attorneys on the staff of the Westchester County District Attorney maliciously obtained an indictment against Bonnie Bardunias solely to use it as leverage against Peter Bardunias.

19) On June 5, 1984, Peter Bardunias and Bonnie Bardunias were

arrested by members of the staff of defendant Vergari.

20) All charges against Bonnie Bardunias were dismissed at the close of the prosecutor's opening statement on May 30, 1985.

21) All charges against Peter Bardunias were dismissed at the close of the prosecutor's case on June 26, 1985.

22) The entire investigation against Peter Bardunias, Bonnie Bardunias and Rosen and Bardunias, was conducted by the defendant Willcox and other attorneys on the staff of the defendant Vergari with assistance from other employees of Westchester County District Attorney.

23) As a result of the investigation by the defendant Vergari and his employees, the defendants knew or should have known that there was no criminal conduct by Peter Bardunias or Bonnie Bardunias.

24) Though they knew that Peter Bardunias and Bonnie Bardunias committed no criminal acts, the defendants continued to investigate and prosecute them.

25) The defendant Willcox had personal animosity against Peter Bardunias and Rosen and Bardunias and the defendant Vergari was aware of that fact and failed and refused to remove defendant Willcox from the investigation and prosecution.

26) The defendants have failed and refused to return to Peter Bardunias the books, records, papers, and other material items seized from his office though due demand has been made.

27) The defendants have failed and refused to return to Peter Bardunias and Bonnie Bardunias the fingerprints taken at the time of arrest though due demand has been made.

28) The defendant County of Westchester has failed and refused to make payment to Peter Bardunias and Rosen and Bardunias for services rendered though due demand has been made.

29) All acts of all defendants were willful and malicious.

FIRST CAUSE
OF ACTION

30) The plaintiff Peter Bardunias repeats, reiterates and realleges the allegations contained in paragraphs 1-29 inclusive.

31) By reason of the foregoing, the plaintiff Peter Bardunias was damaged in his business by loss of business, reputation and good will by the willful and malicious acts of the defendants in the amount of $50,000,000.00.

32) The plaintiff Peter Bardunias

is entitled to treble and punitive damages.

SECOND CAUSE
OF ACTION

33) The plaintiff Peter Bardunias, repeats, reiterates and realleges the allegations contained in paragraphs 1 - 32 inclusive.

34) The plaintiff Peter Bardunias was damaged by loss of personal and business reputation by the willful and mailicious acts of the defendants.

35) The paintiff Peter Bardunias was caused to suffer severe, physical damage which, upon information and belief, will be permanent by reason of the willful and malicious acts of the defendants.

37) By reason of the foregoing the plaintiff Peter Bardunias suffered damage in the amount of $50,000,000.00.

38) The plaintiff Peter Bardunias is entitled to treble and punitive damages.

THIRD CAUSE
OF ACTION

39) The plaintiff Bonnie Bardunias, repeats, reiterates and realleges the allegations contained in paragraphs 1 - 38 inclusive.

40) The plaintiff Bonnie Bardunias was damaged by loss of reputation by the willful and malicious acts of the defendants.

41) The plaintiff Bonnie Bardunias was caused to suffer severe emotional and psychic damage which, upon information and belief, will be permanent, by reason of the willful and malicious acts of defendants.

42) The plaintiff Bonnie Bardunias was caused to suffer severe

physical damage which, upon information and belief will be permanent, by reason of the willful and malicious acts of the defendants.

43) By reason of the foregoing the plaintiff Bonnie Bardunias suffered damage in the amount of $10,000,000.00.

44) The plaintiff Bonnie Bardunias is entitled to treble and punitive damages.

FOURTH CAUSE
OF ACTION

45) The plaintiff Peter Bardunias as parent and natural guardian of Paul Bardunias repeats, reiterates and realleges the allegations contained in paragraphs 1-44 inclusive.

46) The plaintiff Paul Bardunias was caused to suffer severe emotional and psychic damage which, upon information

and belief, will be permanent, by reason of the willful and malicious acts of defendants.

47) The plaintiff Paul Bardunias was caused to suffer severe physical damage which, upon information and belief will be permanent by reason of the willful and malicious acts of the defendants.

48) By reason of the foregoing the plaintiff Paul Bardunias suffered damage in the amount ot $5,000,000.00.

49) The plaintiff Paul Bardunias is entitled to treble and punitive damages.

FIFTH CAUSE
OF ACTION

50) The plaintiff Peter Bardunias as parent and natural guardian of John Bardunias repeats, reiterates and realleges the allegations contained in

paragraphs 1-49 inclusive.

51) The plaintiff John Bardunias was caused to suffer severe emotional and psychic damage which, upon information and belief, will be permanent, by reason of the willful and malicious acts of defendants

52) The plaintiff John Bardunias was caused to suffer severe physical damage which, upon information and belief, will be permanent, by reason of the willful and malicious acts of the defendants.

53) By reason of the foregoing the plaintiff John Bardunias suffered damage in the amount of $5,000,000.00.

54) The plaintiff John Bardunias is entitled to treble and punitive damages.

SIXTH CAUSE
OF ACTION

55) The plaintiff Peter Bardunias as parent and natural guardian of Peter Bardunias (Jr.) repeats, reiterates and realleges the allegations contained in paragraphs 1 - 54 inclusive.

56) The plaintiff Peter Bardunias (Jr.) was caused to suffer severe emotional and psychic damage which, upon information and belief, will be permanent, by reason of the willful and malicious acts of defendants.

57) The plaintiff Peter Bardunias (Jr.) was caused to suffer severe physical damage which, upon information and belief, will be permanent, by reason of the willful and malicious acts of the defendants.

58) By reason of the foregoing the plaintiff Peter Bardunias (Jr.) suffered damage in the amount of

$5,000,000.00

59) The plaintiff Peter Bardunias (Jr.) is entitled to treble and punitive damages.

SEVENTH CAUSE OF ACTION

60) The plaintiffs Peter Bardunias and Bonnie Bardunias repeat, reiterate and reallege the allegations contained in paragraphs 1 - 59 inclusive.

61) The plaintiffs Peter Bardunias and Bonnie Bardunias were forced to expend monies to defenda the false charges willfully and maliciously brought against them by the defendants.

62) By reason of the foregoing the plaintiffs Peter and Bonnie Bardunias were damaged in the amount $200,000.00.

63) The plaintiffs Peter Bardunias and Bonnie Bardunias are entitled to treble and punitive damages.

EIGHTH CAUSE
OF ACTION

64) The plaintiff Peter Bardunias repeats, reiterates and realleges the allegations contained in paragraphs 1 - 63 inclusive.

65) The plaintiff Peter Bardunias performed services for the defendant County of Westchester pursuant to contract and the County of Westchester action in concert with the defendants Vergari and Willcox has willfully and maliciously failed to pay plaintiff Peter Bardunias for his services though due demand has been made for payment.

66) By reason of the foregoing the plaintiff Peter Bardunias has been damaged in the amount of $8,200.00.

WHEREFORE, plaintiffs demand judgement against defendants

(a) On the first cause of action

in favor of Peter Bardunias $50,000,000.00 together with treble and punitive damages

(b) On the second cause of action in favor of Peter Bardunias $50,000,000.00 together with treble and punitive damages

(c) On the third cause of action in favor of Bonnie Bardunias $10,000,000.00 together with treble and punitive damages

(d) On the fourth cause of action in favor of Paul Bardunias $5,000,000.00 together with treble and punitive damages

(e) On the fifth cause of action in favor of John Bardunias $5,000.000.00 together with treble and punitive damages

(f) On the sixth cause of action in favor of John Bardunias (Jr.) $5,000.000.00 together with treble and punitive damages

(g) On the seventh cause of action in favor of Peter Bardunias and Bonnie Bardunias $200.000.00 together with treble and punitive damages

(h) On the eighth cause of action in favor of Peter Bardunias $8,200.00

together with interest, costs, disbursements and attorney fees.

DATED: White Plains, New York
July 14, 1986

MOROSCO & CUNARD
Attorneys for Plaintiffs
99 Court Street
White Plains, New York 10601
(914) 997-9606

VERIFIED ANSWER
Index No. 9830/86

SUPREME COURT: WESTCHESTER COUNTY

PETER BARDUNIAS, BONNIE BARDUNIAS, PETER BARDUNIAS as parent and natural guardian of PAUL BARDUNIAS and JOHN BARDUNIAS and PETER BARDUNIAS,

Plaintiffs,

-against-

COUNTY OF WESTCHESTER, CARL A. VERGARI, as District Attorney, and JON N. WILLCOX, Individually and as Assistant District Attorney,

Defendants.

Defendants, COUNTY OF WESTCHESTER AND CARL A. VERGARI, As District Attorney, by their attorneys, RENDE, RYAN & DOWNES, answering the Verified Complaint of the plaintiff herein:

1. Deny knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs designated "1", "2", "3", "4", "10", "22", "26", and "27" thereof.

2. Deny each and every allegation contained in the paragraphs designated "15", "16", "18", "19", "23",

"24", "25", "28" and "29" thereof.

3. Deny knowledge or information sufficient to form a belief as to the allegations contained in the paragraph designated "7", but admit that at all times herein mentioned the defendant Willcox was an attorney duly admitted to practice in New York, and was an Assistant District Attorney of Westchester County.

4. Deny knowledge or information sufficient to form a belief as the allegations contained in paragraph designated "9", but admit that at all times herein mentioned defendant Vergari was an agent, servant and employee of the County of Westchester and acting for it and within the scope of his employment by it.

5. Deny knowledge or information sufficient to form a belief as to the allegations contained in the paragraph

designated "11", but admits that on August 10, 1982, defendant Willcox commenced an investigation against Peter Bardunias.

AS TO THE FIRST CAUSE OF ACTION

6. Defendants repeat, reiterate and reallege each and every denial to the allegations contained in the paragraphs designated "1" through "29" insofar as said allegations are repeated, reiterated and realleged in paragraph "30" thereof.

7. Deny each and every allegation contained in the paragraphs designated "31" and "32" thereof.

AS TO THE SECOND CAUSE OF ACTION

8. Defendants repeat, reiterate and reallege each and every denial to the allegations contained in the paragraphs designated "1" through "32" insofar as said allegations are repeated, reiterated and realleged in paragraph "33" thereof.

9. Deny each and every

allegation contained in the paragraphs designated "34", "35", "36", "37" and "38" thereof.

AS TO THE THIRD CAUSE OF ACTION

10. Defendants repeat, reiterate and reallege each and every denial to the allegations contained in the paragraphs designated "1" through "38" insofar as said allegations are repeated, reiterated and realleged in paragraph "33" thereof.

11. Deny each and every allegation contained in the paragraphs designated "40", "41", "42", "43" and "44" therof.

AS TO THE FOURTH CAUSE OF ACTION

12. Defendants repeat, reiterate and reallege each and every denial to the allegations contained in the paragraphs designated "1" through "44" insofar as said allegations are repeated, reiterated and realleged in paragraph "45" thereof.

13. Deny each and every

allegation contained in the paragraphs designated "46", "47", "48" and "49".

AS TO THE FIFTH CAUSE OF ACTION

14. Defendants repeat, reiterate and reallege each and every denial to the allegations contained in the paragraphs designated "1" through "49" insofar as said allegations are repeated, reiterated and realleged in paragraph "50" thereof.

15. Deny each and every allegation contained in the paragraphs designated "51", "52", "53" and "54" thereof.

AS TO THE SIXTH CAUSE OF ACTION

16. Defendants repeat, reiterate and reallege each and every denial to the allegations contained in the paragraphs designated "1" through "54" insofar as said allegations are repeated, reiterated and realleged in paragraph "55" thereof.

17. Deny each and every allegation contained in paragraph "56",

"57", "58" and "59".

AS TO THE SEVENTH CAUSE OF ACTION

18. Defendants repeat, reiterate and reallege each and every allegation contained in the paragraphs designated "1" through "59" insofar as said allegations are repeated, reiterated and realleged in paragraph "60" thereof.

19. Deny each and every allegation contained in the paragraphs designated "61", "62" and "63" thereof.

AS TO THE EIGHTH CAUSE OF ACTION

20. Defendants repeat, reiterate and reallege each and every denial to the allegations contained in the paragraphs designated "1" through "63" insofar as said allegations are repeated, reiterated and realleged in "64" thereof.

21. Deny each and every allegation contained in the paragraphs designated "65" and "66" thereof.

FIRST AFFIRMATIVE DEFENSE

22. The answering defendants have absolute immunity from claims raised in plaintiffs' first through seventh cause of action.

SECOND AFFIRMATIVE DEFENSE

23. Plaintiffs claims are barred by the Statue of Limitations.

THIRD AFFIRMATIVE DEFENSE

24. Plaintiffs claims are barred by virtue of their failure to comply with Section 50-e of the General Municipal Law.

FOURTH AFFIRMATIVE DEFENSE

25. Plaintiffs claims are barred by virtue of their failure to comply with Section 50-h of the General Municpal Law.

FIFTH AFFIRMATIVE DEFENSE

26. Plaintiffs lack personal jurisdiction over defendant County of Westchester.

SIXTH AFFIRMATIVE DEFENSE

27. Plaintiffs Peter Bardunias and Bonnie Bardunias were guilty of the

offenses with which they were charged.

SEVENTH AFFIRMATIVE DEFENSE

28. To the extent, if any, that the relief sought herein overlaps with that sought in the action entitled Rosen & Bardunias, et al. v. County of Westchester, et al., Index No. 18404/83, it is barred by the pendency of that action.

WHEREFORE, defendants COUNTY OF WESTCHESTER and CARL A. VERGARI, as District Attorney, demand judgment against the plaintiff as follow:

(a) Dismissing the plaintiff's complaint, together with the costs and disbursements of this action;

(b) in the alternative, and in the event that plaintiffs prevail against the defendants, then it is requested that the Court instruct the jury as to the apportionment of damages among any responsible tort feasors.

DATED: January 13, 1987

Yours, etc.,

RENDE, RYAN & DOWNES
Attorneys for Defendants
County of West. and Vergari
202 Mamaroneck Avenue
White Plains, New York 10601
(914) 681-0444

To:
MOROSCO & CUNARD
Attorneys for Plaintiffs
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White Plains, New York 10601
(914) 997-9606

VERIFIED ANSWER
Index No. 9830/86
ASSIGNED TO: JUDGE DONOVAN

SUPREME COURT: WESTCHESTER COUNTY

PETER BARDUNIAS, BONNIE BARDUNIAS, PETER BARDUNIAS as parent and natural guardian of PAUL BARDUNIAS and JOHN BARDUNIAS and PETER BARDUNIAS,

Plaintiffs,

-against-

COUNTY OF WESTCHESTER, CARL A. VERGARI, as District Attorney, and JON N. WILLCOX, Individually and as Assistant District Attorney,

Defendants.

Defendant, JON N. WILLCOX, by his attorneys, MEAD, DORE, & VOUTE, answering the plaintiff's complaint:

FIRST: Denies each and every allegation contained in paragraphs "18", "24", "25", "29", "31", "32", "34", "35", "36", "37", "38", "40", "41", "42", "43", "44", "46", "47", "48", "49", "51", "52", "53", "54", "56", "57", "58", "59", "61", "62", "63", "65" and "66" of the complaint.

SECOND: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "1", "2", "3", "4", "5", "6", "8", "10", "11", "17", "19", "22", "23", "26", "27" and "28" of the complaint.

THIRD: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "7" of the complaint except admits that the defendant WILLCOX, was an attorney duly admitted to practice in New York, was an Assistant District Attorney of Westchester County.

FOURTH: Denies each and every allegation contained in paragraph "9" and respectfully refers all questions of law to the Court.

FIFTH: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained

in paragraphs "12", "13", "14", "15" and "16" and respectfully refers all questions of law to the Court.

SIXTH: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "20" and "21" refers to records as best evidence.

SEVENTH: The defendant, JON N. WILLCOX, repeats and reiterates each and every admission and denial heretofore made herein with respect to paragraphs "30", "33", "39", "45", "50", "55", "60" and "64" of the complaint with the same force and effect as though fully set forth at length herein.

FIRST AFFIRMATIVE DEFENSE

EIGHTH: The plaintiffs' injuries and/or damages were caused in whole or in part by plaintiffs' own culpable conduct, contributory negligence and/or assumption of risk, and plaintiffs' claim is

therefore barred or diminished to the extent that such culpable conduct, contributory negligence and/or assumption of rish contributed to the occurrence and the injuries and/or damages claimed therefrom.

SECOND AFFIRMATIVE DEFENSE

NINTH: That at no time did the answering defendant commit any of the acts alleged in the complaint, but if it be determined that the said answering defendant did commit any of the said acts and if it be determined that said acts were commited within the scope of his employment, as an Assistant District Attorney, that all such acts were performed in good faith, without mailice, and with reasonable and probable cause in the performance of his duties as an Assistant District Attorny.

THIRD AFFIRMATIVE DEFENSE

TENTH: That at no time did the anwering defendant commit any of the acts alleged in the complaint, but if it be determined that the said answering defendant did commit any the set acts, that at all times the answering defendant acted reasonably, in good faith, in justification, without malice, without willfulness, and without wantonness.

FOURTH AFFIRMATIVE DEFENSE

ELEVENTH: If plaintiffs were detained as alleged in the complaint, said plaintiffs were detained in a reasonable manner.

FIFTH AFFIRMATIVE DEFENSE

TWELFTH: The answering defendant asserts immunity a defense.

SIXTH AFFIRMATIVE DEFENSE

THIRTEENTH: Punitive damages are barred by decisional law of the State of New York as they may not be asserted

against a municipality, its political subdivisions, or its agents or employees.

SEVENTH AFFIRMATIVE DEFENSE

FOURTEENTH: This action is barred by plaintiffs' failure to comply with General Municipal Law, 50(e).

EIGHTH AFFIRMATIVE DEFENSE

FIFTEENTH: This action is barred by plaintiffs' failure to comply with General Municipal Law, 50(h).

NINTH AFFIRMATIVE DEFENSE

SIXTEENTH: This action is barred by plaintiffs' failure to comply with General Municipal Law, 50 (i).

TENTH AFFIRMATIVE DEFENSE

SEVENTEENTH: Plaintiffs' complaint fails to state causes of action for which relief may be granted.

ELEVENTH AFFIRMATIVE DEFENSE

EIGHTEENTH: The causes of action are barred by the applicable Statue of

Limitations as suit was not commenced within the time prescribed therein.

WHEREFORE, the defendant, JON N. WILLCOX, individually, and as ASSISTANT DISTRICT ATTORNEY, demands judgment against the plaintiffs dismissing the complaint, together with all attorneys' fees, costs and disbursements of this action.

Dated: January 14, 1987
White Plains, NY

MEAD, DORE & VOUTE
Attorneys for Defendant,
JON N. WILLCOX, ind., and as
ASSISTANT DISTRICT ATTORNEY
170 Hamilton Avenue
White Plains, NY 10601-1789
(914) 946-1400

TO: MOROSCO & CUNARD, ESQS.
Plaintiffs' Attorney
99 Court Street
White Plains, NY 10601

TO: RENDE, RYAN & DOWNES, ESQS.
Defts. COUNTY OF WESTCHESTER
and CARL A. VERGARI
202 Mamaroneck Avenue
White Plains, NY 10601

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(2)

No. 90-936

FILED
JAN 8 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

PETER BARDUNIAS, BONNIE BARDUNIAS, PETER BARDUNIAS as parent and natural guardian of PAUL BARDUNIAS and JOHN BARDUNIAS and PETER BARDUNIAS,

Petitioners,

against

COUNTY OF WESTCHESTER, CARL A. VERGARI, as District Attorney and JON N. WILLCOX, individually and as Assistant District Attorney,

Respondents.

Brief on Behalf of Respondent Jon N. Willcox in Opposition to Petition for Writ of Certiorari

A. PAUL GOLDBLUM
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THE REPORTER COMPANY, INC., 30 Vesey St., New York, NY 10007—1991
NYC 212-732-6978 Westchester 914-681-1322 Long Island 516-222-0221
(5718—CVR-290)

Issues Presented

(1) Is the presentation of evidence to a grand jury, or the decision not to present certain evidence to a grand jury, the exercise of an investigative or prosecutorial function?

(2) Is the denial of a civil remedy in damages for prosecutorial misconduct by a state prosecutor a denial of due process under the 14th Amendment?

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II. The conduct which is the subject of this application was prosecutorial rather than investigative and thus was properly granted absolute immunity. 3

III. The denial of a private remedy in damages for prosecutorial misconduct is not a denial of due process. 5

CONCLUSION. For the aforestated reasons, it is respectfully submitted that the within petition for a writ of certiorari should be denied. 7

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

PETER BARDUNIAS, BONNIE BARDUNIAS, PETER BARDUNIAS as parent and natural guardian of PAUL BARDUNIAS and JOHN BARDUNIAS and PETER BARDUNIAS,

Petitioners,

against

COUNTY of WESTCHESTER, CARL A. VERGARI, as District Attorney and JON N. WILLCOX, individually and as Assistant District Attorney,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

Summary of Argument

Petitioners' allegations of misconduct, as set forth in their pleadings, relate only to the presentation of evidence to the grand jury and the refusal to return to petitioners their records and fingerprints at the conclusion of their trial. Those are peculiarly prosecutorial rather than investigative functions and are therefore subject to an absolute immunity.

It is not a denial of due process to deny a party a civil remedy for prosecutorial misconduct for there is an overriding need to protect public prosecutors in the performance of their duties. Current conditions in our society do not suggest a need to re-examine that policy.

I.

The petitioners' claim before this court is limited to the failure of the defendants to present certain evidence to a grand jury, the knowing presentation of false evidence, and the refusal to return records and fingerprints.

Petitioners here seek permission to appeal from the state court order which dismissed all but one of their eight causes of action in Action No. 2 of a consolidated action (A-2). In Action No. 1, which is based on the allegedly improper execution of a search warrant, the state court held that certain of the causes of action for assault, false imprisonment and conversion must be dismissed for failure to comply with the New York General Municipal Law § 50-e which requires an adequate notice of claim as a prerequisite (A-5). The state court refused to dismiss petitioners' cause of action arising out of the manner in which the defendants obtained and executed the search warrant (A-5). Petitioners here did not seek leave to appeal to this court from any part of the state court's order affecting any part of Action No. 1.

The complaint in Action No. 2 (the only action before this court), describes alleged misconduct, but does not specify any theory of recovery, leaving it to the ingenuity of the reader to imagine theories which fit the allegations. The complaint alleges the commencement of an investigation of the petitioners (¶11), obtaining and executing a search warrant (¶12), seizure of records (¶13), presentation to the

grand jury of evidence (¶14) which was known to be false (¶15), and the failure to present exculpatory evidence (¶16). Next, after alleging the return and unsuccessful prosecution of an indictment (¶¶17-24) the complaint further alleges that respondent Willcox, failed to return records (¶26) and fingerprints (¶27).

As petitioners' Action No. 1 pleaded a cause of action for the wrongful application and execution of the search warrant, the mere allegation here, in ¶12, that a warrant was obtained and executed and records seized (¶12, 13) must be considered as surplusage, or, at best, background information. Moreover, unlike Action No. 1, no mention is made in Action No. 2 of "civil rights."

It therefore appears that the claim here is based solely upon the presentation of false evidence to a grand jury, the failure to produce exculpatory evidence to a grand jury, and possibly, the failure to return records and fingerprints.

II.

The conduct which is the subject of this application was prosecutorial rather than investigative and thus was properly granted absolute immunity.

The defendants have never denied that investigative activity of a prosecutor is entitled only to a qualified immunity.

Petitioners raise a straw man when they define the issue as being whether the immunity for investigative activity was qualified or absolute (petition, p. 1). The issue is whether the activity of which petitioners complain was investigative in nature or quasi-judicial as being a part of the prosecutorial function, and thus entitled to absolute immunity.

It is difficult to conceive of any activity more quasi-judicial or prosecutorial in nature than that of presenting evidence to a grand jury or determining whether to withhold certain evidence. The state of the law immunizing such conduct, whether it be before the petit or the grand jury, is too clear to justify extensive exposition. It is reviewed at length in *Imbler v. Pachtman,* 424 U.S. 409 (1976) in which this court concluded that at common law there was an absolute immunity for such activity by prosecutors (*id.,* at 424), that it was not abrogated by the Civil Rights Law, 42 U.S.C §1983, and that it even extended to the willful introduction of false and misleading testimony (*id.,* at 422). Such immunity has been applied equally to the presentation of evidence to a grand jury. *Yaselli v. Goff,* 275 U.S. 50 (1927); *Fields v. Soloff,* F.2d , 2d Cir., December 11, 1990.

One can agree with petitioners' closing statement that "* * * an attempt to cloak the District Attorney's investigative function in the grand jury with absolute immunity violates due process of law * * *" (pet., p. 10) but that does not resolve this application. Here the issue is whether the actions of which petitioners complain were investigative in nature. The New York Court of Appeals, in *McGinley v. Hynes,* 51 N.Y.2d 116 (1980), cited by petitioner (pet., p. 8) declined to draw a "bright line" to separate one activity from the other, preferring to do so on a case by case basis (51 N.Y.2d at 124). Nevertheless, in that case, where the court held the prosecutor was engaged in an investigative activity, the court noted that his investigation "* * * had not yet progressed to a stage where individual wrongdoers had been identified or discrete charges of criminality raised" (*id.,* at 125). Here, on the contrary, the alleged wrongdoers and the alleged criminality were known at the start. It is therefore beyond cavil that the presentation of evidence is, in the current state of the law, a prosecutorial function entitled to absolute immunity.

The remaining allegations of failure to return records and fingerprints relate to actions after the termination of the prosecution and as the investigative phase was, by definition, completed, those activities could not have been investigative in nature. Insofar as it deals with the custody and disposition of materials intended to be exhibits in the trial, the manner of their disposition and custody is a natural part of the prosecutorial function.

Although no civil rights action is pleaded in Action No. 2 it should be noted that the right to a return of fingerprints exists by virtue of the New York Criminal Procedure Law §160.50, which sets forth a procedure for the person acquitted to obtain an order for return of fingerprints. However, the statute also permits the prosecutor or the court to oppose such relief if either believes "* * * the interests of justice require otherwise * * *", which clearly delineate a quasi-judicial function.

Petitioner has submitted authorities to the effect that investigative activities of prosecutors are not entitled to absolute immunity, but they have not submitted authority that demonstrates that the activity of defendant-respondent Willcox was investigative in nature and therefore their petition should be denied.

III.

The denial of a private remedy in damages for prosecutorial misconduct is not a denial of due process.

Petitioners' entire constitutional argument is embodied in the following sentence:

> "Thus, it is clear that an attempt to cloak the District Attorney's investigative function in the grand jury with absolute immunity violates due process of law

> because it creates a situation in which a defendant may in fact be prosecuted maliciously without there being any liability on any person for the wrongful act" (Pet., p. 10).

This issue has been directly addressed over many years, much of it summed up in *Imbler v. Patchman, supra,* 424 U.S. 409 (1976) where the court concluded that "to be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty" (*id.,* at 427). However, the court observed, the Prosecutor is subject to political, criminal, and professional sanctions (*id.,* at 429).

If petitioners are instead suggesting that this issue should be revisited today, they have not presented any evidence or reason to suggest that the need to protect prosecutors in the performance of their duties is any less than it was in 1976 when this court decided *Imbler.* Rather, this respondent would suggest that all the evidence is to the contrary and that there is no issue in this case deserving a review by this court.

CONCLUSION

For the aforestated reasons, it is respectfully submitted that the within petition for a writ of certiorari should be denied.

Respectfully submitted,

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White Plains, NY 10601
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A. PAUL GOLDBLUM
Of Counsel

Dated: January 3, 1991

(3)

No. 90-936

Supreme Court, U.S.
FILED
JAN 8 1991
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

PETER BARDUNIAS, BONNIE BARDUNIAS, PETER BARDUNIAS as parent and natural guardian of PAUL BARDUNIAS and JOHN BARDUNIAS and PETER BARDUNIAS,

Petitioners,

v.

COUNTY OF WESTCHESTER, CARL A. VERGARI, as District Attorney and JON N. WILLCOX, individually and as Assistant District Attorney,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of New York, Appellate Division, Second Judicial Department

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS COUNTY OF WESTCHESTER AND CARL A. VERGARI, AS DISTRICT ATTORNEY

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QUESTIONS PRESENTED

1. Petitioners brought an action in state court for malicious prosecution. In the state court proceedings the petitioners did not raise a federal question, nor was one ruled upon. In their application to this Court, petitioners for the first time characterize their claim as a state action for malicious prosecution under the Fourteenth Amendment. Has a federal question been raised, and if it has, have petitioners overcome the weighty presumption against review where the federal question was not pressed or passed upon in the state courts below?

2. At the time the Grand Jury was convened, the prosecution was focused on particular crimes and individuals and the Grand Jury proceedings were not purely investigative. Is the prosecutor entitled, in connection with those proceedings, to absolute immunity from claims by those indicted of malicious prosecution or its federal counterpart?

3. When a prosecutor participates in an allegedly illegal search of the suspects' place of business, is he entitled to absolute immunity in connection with his subsequent activities in presenting a case against them before an indicting Grand Jury?

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COUNTERSTATEMENT OF THE CASE

1. Factual Background

On November 1, 1978 the law firm of Rosen & Bardunias, in a joint venture with the Westchester Bureau of Medical Economics, Inc., entered into a contract with the County of Westchester to do collection work on some of the delinquent accounts of persons who had been patients at the Westchester County Medical Center (WCMC). The contract provided that all collections were to be deposited into a bank account controlled solely by the County. The contract also mandated that the joint venturers make monthly reports setting forth the amount collected on a patient by patient basis.

In or about August, 1979 the County stopped forwarding new accounts to the joint venture due to its unsatisfactory collection results. However, Rosen & Bardunias was permitted to continue to work on the accounts already referred to it. Nevertheless, no reports and monies associated with these accounts were received from Rosen & Bardunias or the Westchester Bureau of Medical Economics, Inc., from late 1979 until in or about May and June, 1982, when suddenly the County received lump sums of approximately $19,400 and $3,600 from the law firm. This apparent irregularity was not noticed by any County employee at the time.

In or about August, 1982 the District Attorney's office was contacted by an employee of Rosen & Bardunias, who stated that Peter Bardunias, the sole proprietor of the firm, had been embezzling funds collected on behalf of WCMC. According to the informant Peter Bardunias panicked that the County might learn of his illicit

activities, and the lump sum payments made in May and June, 1982 were an attempt by him to put back the money he had stolen.

On or about August 10, 1982, Assistant District Attorney Jon N. Willcox commenced a criminal investigation of the collection activities of Rosen & Bardunias. The investigation developed evidence tending to show that Peter Bardunias had committed Grand Larceny and the Falsification of Business Records in the First Degree. In order to uncover further evidence of the criminal activity under scrutiny, ADA Willcox obtained a warrant from County Judge James R. Cowhey to search the offices of Rosen & Bardunias at 199 Main Street, White Plains, New York. The no-knock warrant was executed on October 8, 1982.

Extensive Grand Jury proceedings followed the October 8th search, which culminated in the indictment of Peter Bardunias and his wife and employee, Bonnie, on May 31, 1984 for Grand Larceny in the Second Degree, Falsifying Business Records in the First Degree, and offering a False Instrument for Filing in the First Degree.

The criminal trial of Peter and Bonnie Bardunias began on May 30, 1985. The charges against Bonnie Bardunias were dismissed on May 30, 1985, upon the completion of the prosecutor's opening statement. The charges against Peter Bardunias were dismissed on June 26, 1985, at the close of the prosecutor's case.

2. Proceedings Below

In or about October, 1983 petitioners Peter and Bonnie Bardunias and others commenced an action against

the respondents for false imprisonment, assault, conversion and the violation of civil rights in connection with the October 8, 1982 search of the law offices. That lawsuit is referred to as Action No. 1 in the decision and order of the Court to which the writ is sought, the Appellate Division, Second Department, of the Supreme Court of the State of New York. (See A-1 to A-7)[1]. With regard to that action the allegedly illegal conduct of the members of the Westchester County District Attorney's office was given only a qualified immunity by the court below. (A-4 to A-5). The rulings of the court below with respect to Action No. 1 are *not* the subject of petitioners' application to this Court.

This action, referred to as Action No. 2 by the courts below, was commenced in 1986, and arises out of the prosecution of Peter and Bonnie Bardunias by the District Attorney's office. Also plaintiffs in the action are the children of Peter and Bonnie Bardunias, who are asserting derivative claims.

In their complaint, plaintiffs alleged that:

> "15) The defendant Willcox and other attorneys on the staff on the defendant Vergari presented evidence to the grand jury which they knew or should have known was false and grossly misleading.
>
> "16) The defendant Willcox and other attorneys on the staff of the defendant Vergari failed to present evidence to the grand jury which they knew or should have known would show the falsity and grossly misleading nature of the evidence presented.

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[1] Reference is to the appendix to the petition.

"18) The defendants Willcox and Vergari and other attorneys on the staff of the Westchester County District Attorney maliciously obtained an indictment against Bonnie Bardunias solely to use it as leverage against Peter Bardunias.

"23) As a result of the investigation by the defendant Vergari and his employees, the defendants knew or should have known that there was no criminal conduct by Peter Bardunias or Bonnie Bardunias.

"24) Though they knew that Peter Bardunias and Bonnie Bardunias committed no criminal acts, the defendants continued to investigate and prosecute them.

"25) The defendant Willcox had personal animosity against Peter Bardunias and Rosen and Bardunias and the defendant Vergari was aware of that fact and failed and refused to remove defendant Willcox from the investigation and prosecution."

(A-33 to A-36).

The complaint in Action No. 2 is devoid of any mention of federal statutory or constitutional rights, and endorsed upon the summons was a notice that the nature of the action was for "malicious prosecution". (Record below at A38). (See N.Y. Civ. Prac. R. 305(b) [McKinney 1990]). By contrast, the summons in Action No. 1 listed the causes of action as "defamation, assault, unlawful imprisonment, wrongful conversion and destruction of and damage to property, abuse of process, abuse of execution of process and prima facie tort, and violation 42 USC 1983". (Record below at A15). In addition, at

paragraph 18 of the complaint in Action No. 1 the plaintiffs alleged that, "The defendants and other public servants conspired to cause the injury and damage to plaintiffs in violation of their civil rights". (Record below at A18).

Following joinder of issue in Action No. 2, defendants moved for partial summary judgment dismissing the first seven causes of action, which were for malicious prosecution, on the ground of absolute immunity. (The eighth cause of action was for breach of contract. It has been settled.) No federal question was raised by the motions, and the trial court, passing solely upon the state law claim, wrote:

> "CAUSES OF ACTION RELATED TO THE PROSECUTION
>
> "Defendants' motions for summary judgment are based primarily upon their assertion that the plaintiffs' causes of action are barred by the absolute immunity of the movants. Questions involving the extent of prosecutorial immunity in a case such as this can be more easily addressed by first examining its application to plaintiff's malicious prosecution causes of action in Action No. 2.
>
> * * *
>
> "It is well established that a District Attorney and his Assistant District Attorneys are entitled to absolute immunity for quasi-judicial actions taken within the scope of the official duties, such as initiating and pursuing a criminal prosecution and presenting the State's case. [Citations omitted.] The Supreme Court has stated that qualifying a prosecutor's immunity while he or she was performing a quasi-judicial

function 'would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system', *Imbler v. Pachtman*, 424 US at 427-28.

"Plaintiffs' malicious prosecution causes of action are primarily grounded upon alleged improprieties on the part of A.D.A. Willcox in his presentation of the State's case to the Grand Jury. Plaintiffs' complaint in Action No. 2 contain allegations that A.D.A. Willcox knowingly and maliciously presented false testimony to the Grand Jury, withheld evidence which would have allegedly exonerated Peter and Bonnie Bardunias and continued the Grand Jury investigation though he allegedly knew that Peter and Bonnie Bardunias had committed no crime. While these are certainly very serious allegations, the Court finds that any of plaintiffs' causes of action in Action No. 2 which are based on these allegations, should be dismissed since the alleged misconduct occurred while the prosecutor was performing his quasi-judicial function of presenting the State's case and, therefore, absolute immunity attaches to the case and, therefore, absolute immunity attaches to the prosecutor's actions. [Citations omitted]" (A-13 and A-15 to A-18)

Plaintiffs then appealed that determination, and at page 8 of their brief to the Appellate Division wrote as follows under the heading *"THE CIVIL ACTION"*:

"Plaintiffs instituted the instant action for *malicious prosecution* after the dismissal of all charges. The defendants moved to dismiss claiming absolute prosecutorial immunity and the motion was granted. It is from that judgment that plaintiffs appeal." (emphasis added).

The Appellate Division affirmed the dismissal of the malicious prosecution causes of action, and in doing so did not pass on any federal question. Plaintiffs then sought leave to appeal to the Court of Appeals of the State of New York, which was denied, as was their request for reargument. Their applications to New York's highest court did not contain any charge that defendants violated federal law.

SUMMARY OF ARGUMENT

1. No federal question is raised by the petitioners' request for review of an order dismissing their common-law malicious prosecution action. 28 U.S.C.A. 1257(a). Furthermore, even if a federal question has been raised before this Court, it was not pressed or passed upon in the state courts, where the action was advanced solely on the basis of New York common law. Thus, even if this Court is not jurisdictionally barred from granting certiorari, there is, at the least, a weighty presumption against review. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). Petitioners have made no showing to overcome the presumption, and the sparse record and lack of opportunity for the state courts to pass upon the federal question militate against granting the writ.

2. The substantive questions raised by this application do not warrant review. Petitioners have failed to show that the scope of absolute immunity found by the court below conflicts with decisions of other state courts or the federal Courts of Appeals. Furthermore, the

grounds petitioners advance for deviating from the general rule granting prosecutors absolute immunity in connection with their actions in obtaining an indictment from a Grand Jury are either unsupported by the record or contrary to precedent.

Petitioners have also failed to show that the outcome below conflicts with any decision of this Court or needs to be decided by it. While they decry that the genuinely wronged person is left without civil redress, this Court has already recognized that such a concern is outweighed by the public interest in having vigorous and fearless performance of the prosecutor's duties. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

ARGUMENTS AGAINST GRANTING THE WRIT

I. REVIEW SHOULD BE DENIED AS NO FEDERAL QUESTION IS RAISED. FURTHERMORE, EVEN IF SUCH A QUESTION HAS BEEN RAISED BY THE PETITION, IT WAS NOT PRESSED OR PASSED UPON BELOW, AND PETITIONERS HAVE FAILED TO MAKE ANY SHOWING TO OVERCOME THE WEIGHTY PRESUMPTION AGAINST REVIEW UNDER SUCH CIRCUMSTANCES.

Petitioners describe their claim as a state action "for malicious prosecution under the Fourteenth Amendment" (Petitioners' brief, p. 10). Their characterization is, at the least, anomalous.

A cause of action for malicious prosecution evolved from the common law, not the Constitution. It was recognized long before the Fourteenth Amendment was adopted. See *White v. Frank*, 855 F.2d 956, 959 n.2 (2d Cir.

1988); *Hastings v. Lusk*, 22 Wend. 410, 417 (N.Y. 1839); *Perkins v. Mitchell*, 31 Barb. 461, 468 (N.Y. Sup. Ct. 1860). This Court lacks jurisdiction to review a state court decision construing state common law. See 28 U.S.C.A. 1257(a).

The elements of a cause of action for malicious prosecution are the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, the termination of the proceeding in favor of the accused, the absence of probable cause for the criminal proceeding, and actual malice. *Broughton v. State*, 37 N.Y.2d 451, 457, 335 N.E.2d 310, 314, 373 N.Y.S.2d 87, 94, *cert. denied*, 423 U.S. 929 (1975). It may be that official conduct fitting these elements also gives rise to liability under 42 U.S.C. 1983. *White v. Frank*, 855 F.2d at 961 n.5; cf. *Imbler v. Pachtman*, 424 U.S. 409 (1976). The remedy afforded by Section 1983 is supplementary to the state remedy. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Nevertheless, neither in their petition to this Court or in the state court proceedings have petitioners asserted that they were making a claim pursuant to 42 U.S.C. 1983 in Action No. 2.

Even if this Court were to construe the petition as inartfully raising a federal question, review should be denied because the claim was not pressed or passed upon in the state courts. While such an omission may not be a jurisdictional bar to review, it creates a weighty presumption against it. *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983).

Petitioners have made no attempt to rebut the presumption. No argument is made that the state courts need not have been given an opportunity to decide the

question of federal law. Furthermore, as indicated below, the record is not properly developed to adequately address the issue raised. See *Bankers Life and Cas. Co. v. Grenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 1651 (1988). Lastly, petitioners' difficulty in clearly articulating the federal question does not bode well for its subsequent presentation should a writ be granted. See S. Ct. R. 14.5.

II. REVIEW IS NOT WARRANTED BECAUSE THE SCOPE OF PROSECUTORIAL ABSOLUTE IMMUNITY FOUND BELOW WAS NOT SHOWN TO BE IN CONFLICT WITH THE DECISIONS OF THIS COURT, FEDERAL COURTS OF APPEALS OR THE COURTS OF OTHER STATES, AND DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION.

In *Imbler v. Pachtman*, the prosecutor was alleged to have knowingly used perjured testimony at trial and to have suppressed exculpatory evidence of his expert. 424 U.S. 416. These activities were held to be entitled to absolute immunity from civil liability because they "were intimately associated with the judicial phase of the criminal process." *Id.* at 430.

In granting absolute immunity to Deputy District Attorney Pachtman, this Court was concerned "that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust". *Id.* at 423. While recognizing that such immunity will leave a "genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of

liberty," this Court found that consideration outweighed by the broader public interest in ensuring that the prosecutor vigorously and fearlessly performs his duties. *Id.* at 427-8.

The *Imbler* decision left open whether a prosecutor would be entitled to similar immunity when his responsibilities "cast him in the role of an administrator or investigative officer rather than that of advocate". *Id.* at 430-1. Nonetheless, it acknowledged that the role of advocate for the state was not to be narrowly drawn, and that it involves actions preliminary to the initiation of a prosecution and actions apart from the courtroom:

> "A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence."

Id. at 431 n. 33; see *Malley v. Briggs*, 475 U.S. 335, 341-343 (1986) (dicta that prosecutor seeking indictment is entitled to absolute immunity).

In decisions subsequent to *Imbler*, prosecutors were granted only a qualified immunity when participating in clearly nonadvocatory functions such as participating in an illegal search and/or seizure. *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir. 1982); *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

However, absolute immunity was broadly applied to prosecutors' involvement in Grand Jury proceedings, even when those proceedings were partially investigative. *Powers v. Coe*, 728 F.2d 97, 104 (2d Cir. 1984); *Gray v. Bell*, 712 F.2d 490, 502-4 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Only when the Grand Jury's activities were purely investigative has absolute immunity not been afforded against charges of prosecutorial misconduct in connection therewith. *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978). In *Briggs* the prosecutor's misconduct occurred when the Grand Jury was engaged in a broad fact-finding mission that had not yet focused on any particular suspect. *Id.* at 23-24; *Gray v. Bell*, 712 F.2d at 502-504. Similarly, in a somewhat different context, New York's highest court has held that Grand Jury proceedings are administrative rather than quasi-judicial when the investigation has not yet progressed to the stage where individual wrongdoers have been identified or discrete charges of criminality raised. *McGinley v. Hynes*, 51 N.Y.2d 116, 125-6, 412 N.E.2d 376, 380, 432 N.Y.S.2d 689, 693-694 (1980), *cert. denied*, 450 U.S. 918 (1981).

If it is petitioners' contention that the court below erred in failing to conclude that this case falls within the *Briggs* exception to prosecutorial absolute immunity, the record clearly belies their position. Even petitioners' complaint acknowledges that petitioner Peter Bardunias was a subject of the respondents' investigation before Grand Jury proceedings began (A-32 to A-33). In addition, the search warrant application by respondent Willcox, which

was made before the Grand Jury convened, clearly indicated that the investigation had already focused on Peter Bardunias as a suspect in the commission of Grand Larceny and Falsification of Business Records in the First Degree, charges for which he and his wife were later indicted. (Record below at A86 to A99).

Petitioners have not made a broad attack on the absolute immunity generally accorded to prosecutors in the Grand Jury setting. To the extent that they may be seeking to expand or create exceptions to prosecutorial absolute immunity in connection with Grand Jury proceedings, they have failed to cite any authority in support of their position. Moreover, the record in this case is particularly poor for setting forth on such a venture. It contains only three pages of the transcript of the Grand Jury proceedings, and the allegations of wrongdoing in the complaint are no different than those made in numerous other Section 1983 and malicious prosecution actions dismissed on absolute immunity grounds. *Rose v. Bartle*, 871 F.2d 331, 343-5 (3d Cir. 1989) (soliciting perjured testimony before Grand Jury); *Grant v. Hollenbach*, 870 F.2d 1135 (6th Cir. 1989) (conspiracy to bring false charges); *Maglione v. Briggs*, 748 F.2d 116 (2d Cir. 1984) (bad faith prosecution); see *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987) (withholding exculpatory evidence).

Petitioners also seemingly contend that because members of the District Attorney's office wore the mantle of the investigator at one stage of the underlying matter, i.e., the search, they may not claim absolute immunity when they subsequently became advocates. Petitioners have cited no authority for such a position, which the

Eleventh Circuit Court of Appeals characterized as "unsupported by both reason and precedent." *Mullinax v. McElhenney*, 817 F.2d 711, 715 (1987); see also, *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987) (absolute immunity granted to prosecutor vis-a-vis malicious prosecution claim but not for claim arising out of participation in search); *Cunningham v. State of New York*, 71 A.D.2d 181, 422 N.Y.S.2d 497 (N.Y. App. Div. 1979) (With respect to Grand Jury proceedings, prosecutor entitled to absolute immunity for failing to properly instruct it on law, introducing inadmissible evidence, lack of impartiality, lack of probable cause, overzealous cross-examination of witnesses, selective and highly distorted presentation of evidence, and introducing altered recorded conversations. However, only qualified immunity attached to prosecutor's use of an overtly false affidavit to obtain a wiretap warrant).

Lastly, petitioners contend that by granting prosecutors absolute immunity, they could maliciously harm their enemies without any deterrent. (Petitioners' brief, p. 10). This Court already thoroughly analyzed and resolved that issue in *Imbler*, and petitioners have raised no new considerations in their application.

CONCLUSION

This Court lacks jurisdiction to grant the writ sought by the petitioners. In the alternative, if jurisdiction exists, the petition for a Writ of Certiorari should be denied as the federal question was not pressed or passed upon below, and because petitioners have failed to show that the decision of the Court below deviated from any precedent in this often litigated area.

Respectfully submitted,

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